

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Case No. BKY 04-32869

Chapter 13 Case

Marc Harold Ferris
and Tracie Kay Ferris

Debtors.

**OBJECTION TO CONFIRMATION OF
CHAPTER 13 PLAN BY PROVINCIAL BANK**

TO: DEBTORS; THEIR ATTORNEY, CHAPTER 13 TRUSTEE, JASMINE Z. KELLER;
UNITED STATES TRUSTEE; AND ALL OTHER PARTIES IN INTEREST

1. Provincial Bank, a creditor in this Chapter 13 proceeding, by and through its duly authorized attorney, hereby submits its objection to confirmation of Debtors' Chapter 13 Plan dated May 12, 2004 (the "Plan").

2. The Court will hold a hearing on this objection before the Honorable Dennis D. O'Brien, Judge, U.S. Bankruptcy Court, on July 15, 2004, at 10:30 a.m. or as soon thereafter as counsel can be heard, in courtroom 228A, 316 N. Robert Street, St. Paul, Minnesota 55101.

3. This Court has jurisdiction over this objection pursuant to 28 U.S.C. §§157 and 1334, Bankruptcy Rule 5005, and Local Rule 1070-1. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L).

4. The petition commencing this Chapter 13 case was filed on May 12, 2004. This case is now pending in this court.

5. This Objection arises under 11 U.S.C. § 1324 and Bankruptcy Rule 3015, and is filed under Bankruptcy Rule 9014 and Local Rule 3015-3. Provincial objects to confirmation of the Plan, and request an order denying confirmation of the Plan.

BACKGROUND

6. On May 15, 2000, Debtor Marc Ferris executed a Note in favor of Provincial for \$26,000.00. Attached hereto as **Exhibit A** is a true and correct copy of the Note. The terms of the Note require monthly principle and interest payments of \$329.16 with a balloon payment due on May 15, 2005. By separate agreement Provincial agreed to extend the final payment date to June 15, 2005.

7. The Note is secured by a properly recorded and perfected Mortgage on the Debtors' principle residence. Attached hereto as **Exhibit B** is the Mortgage, which was recorded on June 6, 2000.

8. As of June 16, 2004, Debtors were in default under the terms of the Note and Mortgage for, among other things, there failure to make all payments when due. As of June 16, 2004, the total principle and interest past due under the Note was \$2,398.43, plus attorneys' fees. The total payoff under the Note and Mortgage was \$22,232.09 plus costs and fees, including attorneys' fees. The Debtors are also one month behind in their post-petition payments.

9. As a consequence of the Debtors' default, Provincial accelerated all amounts due under the Note and Mortgage and commenced foreclosure proceedings. A sheriff's sale was scheduled for May 12, 2004, the day the Debtors commenced this bankruptcy case.

10. As of the date of this Objection, Provincial estimates that the fair market value of its collateral is in excess of \$230,000.00. The total debt secured by the Debtors' residence is less than \$200,000.00.

OBJECTION TO CONFIRMATION

10. Provincial objects to confirmation of the Plan for two reasons: (i) the Plan impermissibly modifies the rights of Provincial; and, (ii) the Plan does not provide for the balloon payment due on June 15, 2005 or for payment of Provincial's attorneys' fees.

11. WHEREFORE, Provincial Bank requests entry of an order denying confirmation of the Plan at bar, and for such other and further relief as the court deems appropriate under the circumstances.

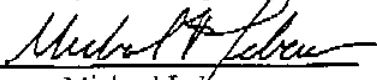
RIDER, BENNETT, EGAN & ARUNDEL, LLP

By /e/ William P. Wassweiler
William P. Wassweiler (232348)
Attorney for Creditor
2000 Metropolitan Centre
333 South Seventh Street
Minneapolis, Minnesota 55402
(612) 340-7973

DATED: July 9, 2004

VERIFICATION

I, Michael Lebens, Vice President of Provincial Bank, state that I have read the attached Objection to Confirmation of Chapter 13 Plan. I declare, under penalty of perjury that the facts contained therein are true and correct to the best of my knowledge, information and belief.

Executed on: July 9th, 2004. 
Michael Lebens

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Case No. BKY 04-32869

Marc Harold Ferris
and Tracie Kay Ferris,

Chapter 13 Case

Debtors.

**MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO
CONFIRMATION OF DEBTORS' CHAPTER 13 PLAN**

Provincial Bank, by its undersigned counsel, files the following memorandum in support of its objection to the Debtors' Chapter 13 Plan in the above-captioned case.

FACTS

The facts are as stated in the Objection to Confirmation of Chapter 13 Plan by Provincial Bank dated July 9, 2004 ("Objection") and incorporated herein by reference. All capitalized terms in the Objection have the same meaning herein.

ARGUMENT

A. The Plan Does Not Comply With 11 U.S.C. §1322

Title 11 of the United States Code § 1322(b)(2) provides in pertinent part:

(b) Subject to subsection (a) and (c) of this section, the plan may –

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . .

Here, the Debtors have impermissibly modified the rights of Provincial. As a consequence of the Debtors' pre-petition defaults, Provincial accelerated the amounts due under the Note and Mortgage. Indeed, the Debtors' filed bankruptcy on the day of the sheriff's sale. Under the circumstances and based on the undisputed fact that the collateral is the Debtors' principal residence, the Debtors' proposed modification of Provincial's rights under the Note and Mortgage by payment of the arrearages over time is in violation of §1322(b)(2). Although 11 U.S.C. §1322(b)(5) allows for cure of any default over a reasonable time, as discussed below, 40 month cure period for a contract that ends in less than 12 months is not reasonable. Moreover, §1322(b)(5) arguably does not apply since, as noted, the last contract payment is due before the final payment under the Plan.

B. The Plan Does Not Comply With 11 U.S.C. §1325.

11 U.S.C. §1325(a)(5) provides in pertinent part:

(a) Except as provided in subsection (b), the court shall confirm a plan if-- . . .

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder . .

In addition, 11 U.S.C. § 506(b) provides:

To the extent that an allowed secured claim is secured by property the value of which, after recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim and any reasonable fees, costs, or charges provided for under the agreement under which the claim arose.

In light of § § 1325(a)(5) and 506(b) and the terms of the respective Contracts entered into by the Debtor Marc Ferris, the Debtors' Plan as proposed is not confirmable. Provincial has not accepted the Plan and the Debtor has failed to surrender the property. In addition, the value, as of the effective date of the Plan, of the property to be distributed under the Plan on account of Provincial's claim *is less* than the allowed amount of such claim. The Plan proposes to make payments to Provincial on account of its claim in an amount totaling \$2,972.82, plus interest at the rate of 8%. The Debtors' have failed to include attorneys' fees in the Plan which Provincial estimates will be \$1,500 as of the confirmation date. See 11 U.S.C. §506. Moreover, the proposed cure period is not reasonable. Final payment under the Note is due on June 15, 2005. The Debtors are not entitled to extend the term of the Note by over 40 months. Finally, there is no provision in the Plan for the balloon payment due on June 15, 2005.

Therefore, the Plan is not confirmable because the value of the property to be distributed to Provincial on account of Provincial's claim is substantially less than Provincial's allowed claim.

CONCLUSION

For the foregoing reasons, Provincial Bank requests that the Court deny confirmation of the Debtors' Chapter 13 Plan.

RIDER BENNETT , LLP

Dated: July 9, 2004

By /e/ William P. Wassweiler .
William P. Wassweiler (#232348)
Attorney for Provincial Bank
333 South Seventh Street, Suite 2000
Minneapolis, MN 55402
(612) 340-7973

MARC H FERRIS 17800 FIREBIRD COURT LAKEVILLE, MN 55044	PROVINCIAL BANK P.O. 459 20280 IBERIA AVE. LAKEVILLE, MN 55044	Loan Number <u>20940</u> Date <u>MAY 15, 2000</u> Maturity Date <u>MAY 15, 2005</u> Loan Amount \$ <u>26,000.00</u> Renewal Of _____
<small>* BORROWER'S NAME AND ADDRESS "I", "me" and "my" means each borrower above, together and separately.</small>	<small>LENDER'S NAME AND ADDRESS "You" and "your" means the lender, its successors and assigns.</small>	

I promise to pay you, at your address listed above, the PRINCIPAL sum of TWENTY SIX THOUSAND AND NO/100 * * * * * Dollars \$ 26,000.00

☒ **Single Advance:** I will receive all of the loan amount on MAY 19, 2000. There will be no additional advances under this note.

☐ **Multiple Advance:** The loan amount shown above is the maximum amount I can borrow under this note. On _____ I will receive \$ _____ and future principal advances are permitted.

Conditions: The conditions for future advances are _____

☐ **Open End Credit:** You and I agree that I may borrow up to the maximum amount more than one time. All other conditions of this note apply to this feature. This feature expires on _____

☐ **Closed End Credit:** You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from MAY 19, 2000 at the rate of 9.000 % per year until MAY 15, 2005.

☐ **Variable Rate:** This rate may then change as stated below.

☐ **Index Rate:** The future rate will be _____ the following index rate: _____

☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

☐ **Frequency and Timing:** The rate on this note may change as often as _____
A change in the interest rate will take effect _____

☐ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

ACCRUAL METHOD: You will calculate interest on a ACTUAL/365 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☐ at a rate equal to _____

☒ **LATE CHARGE:** If I make a payment more than 10 days after it is due, I agree to pay a late charge of 5.000% OF THE LATE PAYMENT WITH A MINIMUM OF \$5.00 AND A MAXIMUM OF \$50.00

☒ **ADDITIONAL CHARGES:** In addition to interest, I agree to pay the following charges which ☒ are ☐ are not included in the principal amount above: DOC FEE AND UCC SEARCH AND FILING FEE

☒ **Authority:** The interest rate and other charges for this loan are authorized by MN STATUTE 47.59

PAYMENTS: I agree to pay this note as follows:

☐ **Interest:** I agree to pay accrued interest _____

☐ **Principal:** I agree to pay the principal _____

☒ **Installments:** I agree to pay this note in 60 payments. The first payment will be \$ 329.16 and will be due JUNE 15, 2000. A payment of \$ 329.16 will be due ON THE 15TH DAY OF EACH MONTH. The final payment of the entire unpaid balance of principal and interest will be due MAY 15, 2005

ADDITIONAL TERMS:

☒ **SECURITY:** This note is separately secured by (describe separate document by type and date): A MORTGAGE DATED MAY 15, 2000

(This section is for your internal use. Failure to list a separate security document does not mean the agreement will not secure this note.)

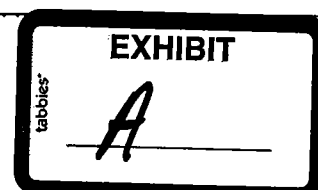
PURPOSE: The purpose of this loan is CONSUMER: DEBT CONSOLIDATION/HOME IMPROVEMENTS

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2). I have received a copy on today's date.

Signature for Lender

X Marc H Ferris
MARC H FERRIS

X
SUSAN STEVENS



- C. Any statement, representation or warranty made by Mortgagor or any co-maker, endorser, guarantor or surety to Lender at any time shall prove to have been incorrect or misleading in any material respect when made.
- D. Mortgagor or any such co-maker, endorser, guarantor or surety shall die, liquidate, merge, consolidate, transfer a substantial part of its property, or if a partnership, limited liability partnership, or limited liability company, suffer the death, dissolution or liquidation of any partner or member.
- E. A good faith belief by Lender that Lender at any time is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment or the value of the Property is impaired.
- 15. REMEDIES ON DEFAULT.** If this is a conventional loan under Minn. Stat. § 47.20, Lender will give borrower written notice of default prior to foreclosure, by certified mail at the address of the Property listed in this Security Instrument or such other address borrower may have designated to Lender in writing, unless the default consists of the sale of the Property without Lender's consent. The notice will specify: (a) the nature of the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is mailed by which the default must be cured; (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the Security Instrument and sale of the Property; (e) that the borrower has the right to reinstate the Security Instrument after acceleration; and (f) that the borrower has the right to bring a court action to assert the nonexistence of a default or any other defense of the borrower to acceleration and sale. Additionally, in some other instances, federal and state law will require Lender to provide Mortgagor with notice of the right to cure or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Mortgagor is in default. Upon default, Lender shall have the right, without declaring the whole indebtedness due and payable, to foreclose against all or any part of the Property. This lien shall continue as a lien on any part of the Property not sold on foreclosure.
- At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the terms of the Secured Debt, this Security Instrument and any related documents including without limitation, the power to sell the property.
- If there is a default, Lender may, in addition to any other permitted remedy, advertise and sell the property as a whole or in separate parcels at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Mortgagor at such time and place as Lender designates. If Lender invokes the power of sale, Lender shall give notice of the sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale. Lender or its designee may purchase the Property at any sale.
- Upon the sale of the Property and to the extent not prohibited by law, Lender shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser. Lender shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Mortgage; (c) any excess to the person or persons legally entitled to it. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.
- If the Property is sold pursuant to this section, Mortgagor, or any person holding possession of the Property through Mortgagor, shall immediately surrender possession of the Property to the purchaser at the sale. If possession is not surrendered, Mortgagor or such person shall be a tenant holding over and may be dispossessed in accordance with applicable law.
- All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require complete cure of any existing default. By not exercising any remedy on Mortgagor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.
- 16. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Mortgagor agrees to pay all of Lender's expenses if Mortgagor breaches any covenant in this Security Instrument. Mortgagor will also pay on demand any amount incurred by Lender for insuring, inspecting, preserving or otherwise protecting the Property and Lender's security interest. These expenses will bear interest from the date of the payment until paid in full at the contract interest rate in effect from time to time as provided in the terms of the Secured Debt. Mortgagor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. This Security Instrument shall remain in effect until released. Mortgagor agrees to pay for any recordation costs of such release.
- 17. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), and all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.
- Mortgagor represents, warrants and agrees that:
- Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance is or will be located, stored or released on or in the Property. This restriction does not apply to small quantities of Hazardous Substances that are generally recognized to be appropriate for the normal use and maintenance of the Property.
 - Except as previously disclosed and acknowledged in writing to Lender, Mortgagor and every tenant have been, are, and shall remain in full compliance with any applicable Environmental Law.
 - Mortgagor shall immediately notify Lender if a release or threatened release of a Hazardous Substance occurs on, under or about the Property or there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor shall take all necessary remedial action in accordance with any Environmental Law.
 - Mortgagor shall immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any pending or threatened investigation, claim, or proceeding relating to the release or threatened release of any Hazardous Substance or the violation of any Environmental Law.
- 18. CONDEMNATION.** Mortgagor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.
- 19. INSURANCE.** Mortgagor shall keep Property insured against loss by fire, flood, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. If Mortgagor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.

AFFIDAVIT OF SERVICE

In Re: March H. Ferris and Tracie K. Ferris

Bky No: 04-32869

Our File No: 15358.107

PATRICIA A. GARVEY, of St. Paul, Minnesota, County of Ramsey, being duly sworn on oath, deposes and states that she is a legal secretary in the office of Rider Bennett, LLP, 333 South Seventh Street, Suite 2000, Minneapolis, Minnesota 55402, and that on the 9th day of July, 2004, she did serve the following documents:

1. Objection to Confirmation of Debtors' Chapter 13 Plan;
2. Verification Signed by Michael Lebens;
3. Memorandum of Law in Support of Objection to Confirmation of Debtors' Chapter 13 Plan; and
4. Affidavit of Service,

in the above-referenced matter, via fax and/or United States Mail, upon the following entities at their last known addresses:

United States Trustee
U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415

Jasmine Z. Keller
Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402

via United States Mail

via United States Mail

Elizabeth Cloutier, Esq.
CLOUTIER & CLOUTIER, LLP
608 2nd Avenue South, Suite 250
Minneapolis, MN 55402

via FACSIMILE and U.S. Mail

Patricia A. Garvey
Patricia A. Garvey

Subscribed and sworn to before me

this 9th day of July, 2004.

Deborah L. Rowan
Notary Public

